No. 3062

United States
Circuit Court of Appeals
For the Ninth Circuit

EMMETT IRRIGATION DISTRICT, a municipal corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer of the Emmett Irrigation District, *Appellants*,

vs.

J. PAUL THOMPSON, A. N. GAEBLER, HELEN M. CONRAD, H. S. GUDSON, HENRY M. WILLIAMS, CHARLOTTE H. SHIPMAN, F. W. HORTON, MARY C. WADDELL, J. WILLIS GARDNER, CHESTER COUNTY TRUST COMPANY, a corporation, NATIONAL BANK OF OXFORD, a corporation, for themselves and all other bondholders of Emmett Irrigation District, similarly situated. *Appellees.*

Appellants' Petition for Rehearing

Upon appeal from the District Court of the United States, District of Idaho, Southern Division

J. M. THOMPSON,
Residing at Caldwell, Idaho, and
FREMONT WOOD and
DEAN DRISCOLL,
Residing at Boise, Idaho,
Solicitors for Appellants and Petitioners.

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PETITION FOR REHEARING

Come now the appellants above named, by their counsel of record herein, and petition this Honorable Court for a rehearing herein on the following grounds:

I.

It does not appear from the decision of the court herein, that the court has passed upon the excessive issue of bonds maturing in twenty years from date,

to wit, January 1st, 1931; or the deficiency in amount of bonds which should have matured on the 1st day of January, 1927, the same being covered by and included in subdivision (c), paragraph 18 of appellants' assignment of error, transcript, pp. 223 and 224.

II.

Because it fails to appear from the decision and record herein, that the court has passed upon the appellants' objections to the decree in this cause, quieting the title to the bonds owned and held at the time of the commencement of this action by J. Paul Thompson, the original plaintiff in this action, after he had failed and refused to answer the interrogatories, in accordance with the decision of the trial court. Appellants' Assignments of Error 1a and 1b, Trans., p. 217.

We are led to the conclusion first stated, by reason of the fact that the court has apparently followed the conclusions as well as the facts stated by the trial court, wherein the trial court states, "The defenses are therefore limited to the claims that the bonds are irregular in their form and in the manner of their execution, and that many of them, as appears from the contract and explanatory testimony, were disposed of for an irregular consideration." As to these conclusions this court says:

> "We agree with the court below, that the objection made to the form of the bonds and the manner of their issuance are without merit."

If it was the purpose or intent of this court to pass upon the effect of the under issue of the sixteen year maturities, or the over issue of the twenty year maturities, it is apparent that it must have done so with the above general adoption of the conclusions reached by the trial court. But we do not understand and we cannot conclude that it was the intention of this court to hold and decide that an under issue or over issue of bonds to become due upon any specific date is an irregularity that goes only to the form or the manner of the execution of the bond. The trial court, and this court, has held that the objections raised as to the form of the bonds and manner of execution are without merit. But it nowhere appears in the decision of the trial court quoted, or in the decision of this court, that the extension of the twenty year maturity of $10,000.00 beyond the power of the District to contract is a matter of form and in its application to this case that the objection is without merit. We apprehend that there is no doubt in the mind of the court that the sixteen year issue, due on January 1st, 1927, was actually $10,000.00 less than the amount required by law for distribution to that particular payment, and that likewise there is no question but that the twenty year issue was actually $10,000.00 in excess of the amount which the law required should be paid at that maturity. The language of the bond (Trans., p. 14) for the sixteenth year maturity, is as follows:

> "One hundred and ten thousand dollars ($110,000.00) in amount, being bonds numbered

from M-43 to M57, inclusive, and from D-657 to D-826, inclusive, on January 1st, 1927."

We concede that the statement in numerals of $110,000.00 is the correct amount which the law required should be paid at this maturity, but this statement of amount is limited by particular description of the bonds by letter and number, limiting the issue to $100,000.00, the explanatory language being as follows: "being bonds numbered from M-43 to M-57, inclusive, and from D-657 to D-826, inclusive, on January 1st, 1927."

The bond shows upon its face that the bonds embraced in the entire issue consist of three denominations. Bonds of $100.00 each, $500.00 each and $1,000.00 each. The $1,000.00 bonds are numbered M-1 to M-262, inclusive, being 262 in number; the $500.00 bonds were numbered from D-1 to D-1646, being 1646 in number. The $100.00 bonds were numbered consecutively from C-1 to C-150, being 150 in number. It appears then upon the face of the bonds that the sixteen year maturity as actually issued was only $100,000.00, as shown by the bonds actually enumerated

M-43 to M-57, 15 bonds	$ 15,000.00
D-657 to D-826, 170 bonds	85,000.00
Making a total of	$100,000.00

In the same manner the bond shows the twenty year maturity to be $186,000.00 instead of $176,000.00, as stated in the bond itself. The bonds enumerated in this issue being M-193 to M-262, inclu-

sive, and D-1451 to D-1646. This enumeration shows that there were seventy of the M. denominations, or $70,000.00, and 232 of the D. denominations, amounting to $116,000.00, making a total of $186,-000.00.

If we are correct in our conclusion that the statement of the amount is controlled and limited by the actual enumeration of the specific bonds issued under these maturities, there can be no question about the $10,000.00 shortage in the sixteen year maturities and the $10,000.00 excess in the twenty year maturities. The legal effect of this unlawful exercise of power has added to the actual obligation of the district, as permitted by the statute, twenty-four hundred dollars, this amount being four years' interest at six per cent. on the $10,000.00, which should have been paid January 1st, 1927, but is actually carried forward and not made payable until January 1st, 1931.

We think it a matter of justice to the court, as well as in the interests of the appellants, that this matter may be called to the attention of the court, in order that the legal effect of this situation may be specifically and understandingly passed upon.

We are not contending that this usurpation of power exercised in the issuance of the two maturities above referred to, extend to the entire bond issue; neither are we satisfied that the district has been injured by the failure to make the sixteen year maturity $110,000.00 instead of $100,000.00, but we must respectfully urge upon the court that the $10.-

000.00 excess of the twenty year maturity, in its application to this action must extend to all the bonds of that maturity. Because, if any of them are void on account of the excessive issue, they are all void, and the court is without power to segregate and point out those which are valid and those which are invalid.

We understand that it was the intention of this court to apply the doctrine of estoppel only upon the assumption that the District acted within the proper exercise of its legal powers. To this part of the decision we are taking no exception, but are urging upon the court that the fixing of these two maturities was unauthorized by the law and therefore an excessive use of power and in direct violation of the limitation of power imposed by the Legislature.

Section 2397 of the Idaho Revised Codes requires that such bonds "shall be negotiable in form and payable in money of the United States as follows, to wit: At the expiration of eleven years from each issue, five per cent of the whole number of bonds of such issue; at the expiration of twelve years, six per cent; at the expiration of thirteen years, seven per cent; at the expiration of fourteen years, eight per cent; at the expiration of fifteen years, nine per cent; at the expiration of sixteen years, ten per cent; at the expiration of seventeen years, eleven per cent; at the expiration of eighteen years, thirteen per cent; at the expiration of nineteen years, fifteen per cent; at the expiration of twenty years, sixteen per cent; *Provided*, That such percentages may be changed suf-

ficiently so that every bond shall be in an amount of one hundred dollars or a multiple thereof, and the above provisions shall not be construed to require any single bond to fall due in partial payments."

Under the command of this statute the sixteen year maturity was exactly $110,000, and the twenty year maturity was exactly $176,000.00. The district, however, has not observed these limitations, and in that respect there is a bond issue herein one instance in excess and in the other a deficiency, each in the same amount.

In the case of Brenham vs. German American Bank, 144 U. S. Rep. 173, the United States Supreme Court held that bonds issued by a city with the provision on the face of each bond that it should be redeemable by the city, "after the expiration of ten years from date," when the ordinance which authorized the issue, provided that the city should have the right to redeem "at any time after five years from date" rendered the entire issue void, "because the officers of the city had no power to depart from the terms of the ordinance by varying the time limited for redemption," and, "as there was no authority to issue the bonds, even a bona fide holder of them cannot have a right to recover upon them or their coupons." Citing in support thereof:

March v. Fulton County, 77 U. S., 10 Wall. 676, (19:1040);

East Oakland v. Skinner, 94 U. S. 255, (24: 125);

Buchanan v. Litchfield, 102 U. S. 278, (26: 138);

Hayes v. Holley Springs, 114 U. S. 120, (29: 81);

Daviess County v. Dickinson, 117 U. S. 657, (29:1026);

Hopper v. Covington, 118 U. S. 148, 151, (30: 190, 192);

Merrill v. Monticello, 138 U. S. 673, 681, 682, (34:1069, 1073).

"Where the statute has fixed the term for which bonds shall run, bonds in which payment is undertaken at the expiration of either a shorter, (Peoples Bank v. School District, 3 N. D. 406 . . .) or a longer term, (Norton v. Town of Dyersburg, 127 U. S. 160 . . ., Barnum v. Okalona, 148 U. S. 393, . . .) than that authorized are invalid." Stowell v. Realto Irr. Dist., (Cal.) 100 Pac. 248-251.

In the case of Peoples Bank v. School District, supra, the bonds involved were made payable eleven days short of ten years from their date, and these bonds were held absolutely invalid, the court saying: "There is no more power to issue bonds payable eleven days less than ten years from date than nine years less. If the question is to depend upon the magnitude of the departure from the statutory requirement it will be impossible to know where to draw the line. If we ought not to draw it at the period of eleven days upon what principle can we draw it at 30 days, or six months or a year."

Assuming that we are correct in our conclusion that the fixing of the amount of the sixteen and

twenty year maturities is in violation of the limitation of power conferred by the legislature, "the purchaser or holder of municipal bonds is chargeable with notice of the requirements of the law under which they are issued." Barnett v. City of Denison, 145 U. S. 135.

Upon this question we call the attention of the court to the authorities quoted on pages 34 to 39, inclusive, of our original brief in this case. These authorities were presented in the original brief in support of the question here presented, but also in connection with other questions decided adversely to appellants, and which are not involved in this application for rehearing.

The second ground of this petition involves that portion of the decree which in effect quiets the title to the original plaintiff in the action, J. Paul Thompson, in and to the specifically enumerated bonds set forth in the original bill of complaint. This objection is based upon the refusal of the plaintiff Thompson to answer the interrogatories for discovery which were submitted for his answer on August 17, 1916, under equity rule 58, (T. pp. 91-95). For this reason the appellants contend that the said plaintiff should not be permitted to share the benefits of this favorable decree, under the doctrine of class representation. Thompson, having refused to answer the interrogatories, the bill as to him should have been dismissed with prejudice under the provisions of equity rule 58.

It is true that we did not make the motion for dismissal as to Thompson upon the trial, because we desired a final ruling by which he would be bound in the final decree. Under the equity rule cited, "Any party failing or refusing to comply with such an order shall be liable to attachment and shall also be liable if a plaintiff to have his bill dismissed."

It will be noted that the actual making of the order for the examination of plaintiff, pursuant to the rule, was waived by plaintiff's counsel by stipulation (T. p. 95). The order having been waived by stipulation of counsel, the requirement for the actual answer of the interrogatories was as binding upon the plaintiff as though the order for the examination had actually been made by the court.

The interrogatories submitted are fully set forth (T. pp. 91-44). The bill of complaint shows that this plaintiff was the owner and holder of more than $100,000.00 of this bond issue, and the appellants believe that an answer to these interrogatories would disclose the fact that this plaintiff was the representative of Corkill or Corkill & Company, and fully advised of all the transactions of which we complain, and that the bonds enumerated in his bill of complaint were a portion of the bonds which we have throughout the proceedings referred to as the commission bonds. This plaintiff, however, not only refused to answer the interrogatories but failed to appear at the trial, and his counsel consents to a dismissal as to him, assuming, of course, that he will acquire all the rights under the further prosecution of the case in

the name of the new plaintiffs upon application of the doctrine of class representation.

As this is an equity action, we think the conduct of this plaintiff, in its application to this case, has been such that he should not be permitted to profit by the decree herein.

Again, by reference to the bill of complaint herein, it appears that a considerable portion of the bonds owned by this plaintiff are included in and a portion of the sixteen and twenty year maturities, the latter of which we contend is absolutely void, the former maturity probably void. By reference to the recitals in the bond the sixteen year maturity consists of bonds M-43 to M-57, inclusive, and from D-657 to D-826 inclusive. (T. p. 14.)

The plaintiff's original complaint, (T. p. 18) shows that plaintiff holds of the sixteen year maturities bonds D-673, D-674, D-675, D-676, D-717 to D-726 inclusive, D-742, D-743, D-780, D-783, D-784, D-785, D-786, D-787, D-788, D-801 to D-814 inclusive, being 37 bonds, amounting to $18,500.00. It also shows that plaintiff Thompson holds of the twenty year maturity M-203 and M-232; also D-1432, D-1598, D-1599 and D-1600 to D-1609 inclusive, the same being two bonds for $1,000.00 and 13 bonds for $500.00 each, making a total of $8,500.00.

Even though the court should hold against us upon the point that the plaintiff Thompson is not entitled to a decree, by reason of his failure to answer the interrogatories for discovery, there should still be excepted from the decree in his favor, the bonds issued

in excess of authority and specifically enumerated in his complaint, because such bonds are absolutely void.

For the reasons above given, your petitioners respectfully pray that such rehearing be had.

Respectfully submitted,

J. M. THOMPSON,
Residing at Caldwell, Idaho, and
FREMONT WOOD and
DEAN DRISCOLL,
Residing at Boise, Idaho,
Solicitors for Appellants and Petitioners.

I, J. M. THOMPSON, residing at Caldwell, Idaho, of counsel for the appellants and petitioners in the foregoing petition named, do hereby certify, that in my judgment the said petition is well founded and that it is not interposed for delay.

J. M. THOMPSON.